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9 PHONG TRAN

10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12 **(HON. MARILYN HUFF)**

13 UNITED STATES OF AMERICA,
14 Plaintiff,

15 v.

16 PHONG TRAN,
17 Defendant.

} Case No. 16CR1409H

} NOTICE OF MOTIONS AND
} MOTIONS TO:

- } 1) COMPEL DISCOVERY AND
} PRESERVE EVIDENCE and;
} 2) GRANT LEAVE TO FILE
} FURTHER MOTIONS

18 **TO: LAURA DUFFY, UNITED STATES ATTORNEY, AND HER**
19 **REPRESENTATIVE, VALERIE CHU, ASSISTANT UNITED STATES**
20 **ATTORNEY:**

21 **PLEASE TAKE NOTICE** that on July 25, 2016 at 2:00 p.m., or as soon
22 thereafter as counsel may be heard, the Defendant, Phong Tran, by and through his
23 attorney, Thomas J. Warwick, Jr. will ask this Court to enter an order granting the
24 motions listed below.
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MOTIONS

Defendant, PHONG TRAN, by and through his attorney, Thomas J. Warwick, Jr., pursuant to the Fourth, Fifth, and Sixth Amendments to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law, and local rules, hereby moves this Court for an order:

- 1) To compel further discovery and preserve evidence; and
- 2) Grant leave to file further motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, and any and all other materials that may come to this Court's attention at the time of the hearing on these motions.

Dated: July 12, 2016

Respectfully Submitted,

/s/ THOMAS J. WARWICK, JR.

THOMAS J. WARWICK, JR.
Attorney for Defendant
PHONG TRAN

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8 Attorney for Defendant
9 PHONG TRAN

10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12 **(HON. BERNARD G. SKOMAL)**

13 UNITED STATES OF AMERICA,
14 Plaintiff,

15 v.

16 PHONG TRAN,
17 Defendant.

Case No. 16CR1409H

NOTICE OF MOTIONS AND
MOTIONS TO:

- 1) COMPEL DISCOVERY AND
PRESERVE EVIDENCE and;
- 2) GRANT LEAVE TO FILE
FURTHER MOTIONS

18 **I.**
19 **STATEMENT OF THE CASE**
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21 On June 16, 2016 a complaint was filed against Mr. Tran alleging Title 18,
22 U.S.C., Sec. 371 (Conspiracy), Title 18, U.S.C., Sec. 1341 and 1356 (Honest
23 Services Mail Fraud), Title 18 U.S.C., Sec. 1952(a)(1) and (a)(2) (Travel Act),
24 Title 18, U.S.C., Sec. 2 (Aiding and Abetting), Title 18 U.S.C., Sec. 981 (a)(1)(c)
25 and Title 28, U.S.C., Sec. 2461 (c) (Criminal Forfeiture). Mr. Tran was indicted on
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1 June 16, 2016 on this same charge. On June 29, 2016, Mr. Tran was arraigned on
2 the indictment.

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4 **II.**
MOTION TO COMPEL FURTHER DISCOVERY

5 Mr. Tran requests the following discovery pursuant to Fed. R. Crim. P. 16:
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7 (1) The Defendant's Statements. Under Fed. R. Crim. P. 16 (a)(1)(A), the
8 defendant is entitled to the disclosure of all copies of any written or recorded
9 statements made by the defendant; defendant; the substance of any statements
10 made by the defendant which the Government intends to offer in evidence at trial;
11 any response by the defendant to interrogation; the substance of any oral
12 statements which the Government intends to introduce at trial, and any written
13 summaries of the defendant's oral statements contained in the handwritten notes of
14 the government agent; any response to any Miranda warnings which may have
15 been given to the defendant (see United States v. McElroy, 697 F.2d 459 (2d Cir.
16 1982)); and any other statements by the defendant that are discoverable under Fed.
17 R. Crim. P. 16(a)(1)(A). The Advisory Committee Notes, as well as the 1991
18 amendments to Rule 16, make it clear that the Government must reveal all of the
19 defendant's statements, whether oral or written, regardless of whether the
20 Government intends to introduce those statements.
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1 (2) Arrest Reports, Notes, and Audio and/or Video Tapes. Mr. Tran also
2 specifically requests that all arrest reports, notes, and all audio and/or video tapes
3 that relate to the circumstances surrounding his arrest or any questioning, if such
4 reports, notes, or tapes have not already been produced in their entirety, be turned
5 over to him. This request includes, but is not limited to, any rough notes, records,
6 reports, transcripts, or other documents in which statements of the defendant or any
7 other discoverable material is contained. This is all discoverable under Fed. R.
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Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963). (See also United
States v. Johnson, 525 F.2d 999 (2d Cir. 1975); United States v. Lewis, 511 F.2d
798 (D.C. Cir. 1975); United States v. Pilnick, 267 F. Supp. 791 (S.D.N.Y. 1967);
and Loux v. United States, 389 F.2d 911 (9th Cir. 1968).) Arrest reports,
investigator's notes, memos from arresting officers, dispatch tapes, sworn
statements, and prosecution reports pertaining to the defendant are available under
Fed. R. Crim. P. 16(a)(1)(B) and (C), Fed. R. Crim. P. 26.2 and 12(I).

1 (3) Reports of Tests and/or Examinations. Pursuant to Fed. R. Crim. P.
2 16(D), Mr. Tran requests the reports of all tests and examinations conducted upon
3 the evidence in this case, including, but not limited to, any fingerprint testing done
4 upon any evidence obtained in this case that is within the possession, custody, or
5 control of the Government, the existence of which is known, or by the exercise of
6 due diligence may become known, to the attorney for the Government, and which

1 are material to the preparation of the defense or which are intended for use by the
2 Government as evidence in chief at the trial. Mr. Tran also requests copies of any
3 reports of physical and mental examinations, which are material to the defense or
4 intended for use by the Government as evidence at the trial. (Fed. R. Crim. P.
5 16(a)(1)(D).)

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8 (4) Brady Material. Mr. Tran requests all documents, statements, agents'
9 reports, and tangible evidence favorable to the defendant on the issue of guilt
10 and/or which affects the credibility of the Government's case. Impeachment, as
11 well as exculpatory evidence, falls within Brady's definition of evidence favorable
12 to the accused. (United States v. Bagley, 473 U.S. 667 (1985).) This request
13 specifically includes any information about out-of-court identifications of Mr. Tran
14 by percipient witnesses to any transactions.

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17 (5) Evidence Seized. Evidence seized as a result of any search, either
18 warrantless or with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(c).

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20 (6) Request for Preservation of Evidence. Mr. Tran requests that all
21 surveillance and any other relevant tapes, photographs, or any other physical
22 evidence that may be destroyed, lost, or otherwise put out of the possession,
23 custody, or care of the Government and which relate to the arrest or the events
24 leading to the arrest in this case be preserved. This request specifically includes,
25 but is not limited to, any and all audiotapes of monitored telephonic
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1 communications, and any evidence seized from any third party. It is requested that
2 the Government be ordered to question all of the agencies and individuals involved
3 in the prosecution and investigation of this case to determine if such evidence
4 exists and, if it does exist, to inform those parties to preserve any such evidence.
5 Specifically, the defense requests the preservation and opportunity to inspect and
6 copy all physical evidence that is allegedly involved in this case.
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9 (7) Tangible Objects. Mr. Tran requests, under Fed. R. Crim. P.
10 16(a)(2)(c), the opportunity to inspect and copy, as well as test, if necessary, all
11 other documents and tangible objects, including photographs, books, papers,
12 documents, photographs of buildings or places, or copies of portions thereof,
13 which are material to the defense or intended for use in the Government's case-in-
14 chief, or were obtained from or belong to the defendant.
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17 (8) Evidence of Bias or Motive to Lie. Mr. Tran requests any evidence
18 that any prospective Government witness is biased or prejudiced against the
19 defendant, or has a motive to falsify or distort his or her testimony. This request
20 specifically includes, but is not limited to, any evidence that the percipient
21 informant-witnesses are biased against the defendant, or has a motive to falsify or
22 distort their testimony. (Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United States
23 v. Strifler, 851 F.2d 1197 (9th Cir. 1988).)
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1 (9) Impeachment Evidence. Mr. Tran requests any evidence that any
2 prospective Government witness has engaged in any criminal act, whether or not
3 resulting in a conviction, and whether any witness has made a statement favorable
4 to the defendant. (See Fed. R. Evid. 608, 609 and 613.) Such evidence is
5 discoverable under Brady v. Maryland, supra. (See United States v. Strifler, 851
6 F.2d 1197 (9th Cir. 1988) (witness' prior record); and Thomas v. United States, 343
7 F.2d 49 (9th Cir. 1965) (evidence that detracts from a witness' credibility).)

8 (10) Evidence of Criminal Investigation of Any Government Witness. Mr.
9 Tran requests any evidence that any prospective witness is under investigation by
10 federal, state, or local authorities for any criminal conduct. (See United States v.
11 Chitty, 760 F.2d 425 (2d Cir.) cert. denied, 474 U.S. 945 (1985).)

12 (11) Evidence Affecting Perception, Recollection, Ability to
13 Communicate, or Truth Telling. The defense requests any evidence, including any
14 medical or psychiatric report or evaluation, tending to show that any prospective
15 witness' ability to perceive, remember, communicate, or tell the truth is impaired;
16 and any evidence that a witness has ever used narcotics or other controlled
17 substance, or has ever been an alcoholic. (United States v. Strifler, 851 F.2d 1197
18 (9th Cir. 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980).)

19 (12) Name of Witnesses Favorable to the Defendant. Mr. Tran requests the
20 name of any witness who made an arguably favorable statement concerning the
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1 defendant. (Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North
2 Carolina, 637 F.2d 213, 223 (4th Cir. 1980); Jones v. Jago, 575 F.2d 1164, 1168
3 (6th Cir.), cert. denied, 439 U.S. 883 (1978); Hudson v. Blackburn, 601 F.2d 785
4 (5th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).)

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6 (13) Statements Relevant to the Defense. Mr. Tran requests disclosure of
7 any statement that may be “relevant to any possible defense or contention” that he
8 might assert. (United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982).)

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10 (14) Jencks Act Material. The defense requests all material to which
11 defendant is entitled pursuant to the Jencks Act, 18 U.S.C. § 3500, and Fed. R.
12 Crim. P. 26.2. These materials are producible after a witness testifies at a pretrial
13 motion to suppress, Fed. R. Crim. P. 12(I), and after a witness testifies at trial. (18
14 U.S.C. § 3500.) Mr. Tran specifically requests pretrial production of these
15 statements so that the court may avoid unnecessary recesses and delays for defense
16 counsel to properly use any Jencks statements and prepare for cross-examination.
17 A verbal acknowledgment that “rough” notes constitute an accurate account of the
18 witness’ interview is sufficient for the report or notes to qualify as a statement
19 under 18 U.S.C. § 3500(e)(1). (Campbell v. United States, 373 U.S. 487, 490-92
20 (1963).) In United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991), the Ninth
21 Circuit held that when an agent goes over interview notes with the subject of the
22 interview the notes are then subject to the Jencks Act.
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1 (15) Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150
2 (1972), Mr. Tran requests all statements and/or promises, express or implied, made
3 to any government witnesses, in exchange for their testimony in this case, and all
4 other information which could arguably be used for the impeachment of any
5 government witness.
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8 (16) Grand Jury Transcripts. Transcripts of all testimony given before the
9 Grand Jury and those portions of Grand Jury minutes containing relevant testimony
10 of persons whom the Government intends to call as witnesses in an evidentiary
11 hearing or trial in the above-captioned case.
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13 (17) Government Examination of Law Enforcement Personnel Files. Mr.
14 Tran requests that the Government examine the personnel files and any other files
15 within its custody, care, or control, or which could be obtained by the Government,
16 for all testifying witnesses, including testifying officers and agents who may have
17 been controlling or contacting any confidential informant in this case. Mr. Tran
18 requests that the Assistant U.S. Attorney assigned to this case ensure that a review
19 is conducted of all such files involved in the present case for evidence of perjurious
20 conduct or other like dishonesty, or any other material relevant to impeachment, or
21 any information that is exculpatory, pursuant to its duty under United States v.
22 Henthorn, 931 F.2d 29 (9th Cir. 1991).
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27 (18) Expert Witnesses. Mr. Tran requests the name, qualifications, and a
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1 written summary of the testimony of any person that the Government intends to
2 call as an expert witness during its case-in-chief. (Fed R. Crim. P. 16(a)(1)(E).)

3 (19) Any Information That May Result in a Lower Sentence. As discussed
4 above, this information is discoverable under Brady v. Maryland, 373 U.S. 83
5 (1963). This request includes any cooperation or attempted cooperation by the
6 defendant, as well as any information that could affect any base offense level or
7 specific offense characteristic under Chapter Two of the Guidelines. Also included
8 in this request is any information relevant to a Chapter Three adjustment, a
9 determination of the defendant's criminal history, or any other application of the
10 Guidelines.
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12 (20) The Defendant's Prior Record. Evidence of prior record is available
13 under Fed. R. Crim. P. 16(a)(1)(B).
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15 (21) Any Proposed 404(b) Evidence. Evidence of prior similar acts is
16 discoverable under Fed. R. Crim. P. 16(a)(1)(c) and Fed. R. Evid. 404(b) and 609.
17 In addition, under Fed. R. Evid. 404(b), “upon request of the accused, the
18 prosecution . . . shall provide reasonable notice in advance of trial . . . of the
19 general nature . . .” of any evidence the government proposes to introduce under
20 Fed. R. Evid. 404(b) at trial. The defendant requests that such notice be given three
21 (3) weeks before trial in order to give the defense time to adequately investigate
22 and prepare for trial.
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2 (22) Residual Request. Mr. Tran intends by this discovery motion to
3 invoke his rights to discovery to the fullest extent possible under the Federal Rules
4 of Criminal Procedure and the Constitution and laws of the United States. Mr. Tran
5 also requests that the Government provide him with the above material sufficiently
6 in advance of trial so as to avoid unnecessary delay prior to cross-examination.
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11 **III.**
12 **MR. TRAN REQUESTS LEAVE TO FILE FURTHER MOTIONS**

13 After review of the discovery in this case, the defense may find it necessary to file
14 further motions. It is, therefore, requested that defense counsel be allowed the
15 opportunity to file further motions based upon information gained through the
16 discovery process.
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IV.
CONCLUSION

For the foregoing reasons, Mr. Tran respectfully requests that this Court grant the above motions.

Dated: July 12, 2016

Respectfully Submitted,

/s/ THOMAS J. WARWICK, JR.

THOMAS J. WARWICK, JR
Attorney for Defendant
PHONG TRAN